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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1476

EMMETT J. STEBBINS,

Petitioner,

v.

ALLSTATE INSURANCE COMPANIES

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMMETT J. STEBBINS,
Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Emmett J. Stebbins, respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia, entered in this proceeding on February 4, and 27, 1974.

OPINIONS BELOW

There was no formal opinion of the District Court, or the Appellate Court. The District Court entered the following orders –

December 14, 1971:

> This matter came before the Court upon the motion of Defendant Allstate Insurance Company to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in said motion as well as the arguments raised in Plaintiff's Opposition to said motion, Defendant Allstate Insurance Company's reply to said Opposition and Plaintiff's supplemental opposition, it is hereby
>
> ORDERED that the motion of Defendant Allstate Insurance Company is granted and Plaintiff's complaint be, and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

February 2, 1972:

> Upon consideration of the Motion of plaintiff to vacate order dismissing complaint against Allstate Insurance Companies filed herein, December 17, 1971, it is this 2nd day of February, 1972
>
> ORDERED that the Motion be and the same hereby is denied.

April 24, 1972:

> This matter came before the Court upon the motion of Defendant Equal Employment Opportunity Commission to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in support of said motion as well as the arguments raised in Plaintiff's Opposition to said motion, it is hereby
>
> ORDERED that the motion of Defendant Equal Employment Opportunity Commission is granted and Plaintiff's complaint be and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

Plaintiff appealed to the United States Court of Appeals for the District of Columbia. The Appellate Court entered its order May 19, 1972 –

> On consideration of appellant's motion for summary reversal and remand of case for trial, and of the responsive pleadings filed with respect thereto, it is
>
> ORDERED by the Court that appellant's aforesaid motion is held in abeyance pending this Court's decision in Stebbins v. Keystone Insurance Company, No. 24658, argued on October 22, 1971.

July 24, 1973:

> On consideration of appellant's motion for summary judgment and remand of the

case for trial, and of appellant's suggestion to the Court, it is

ORDERED by the Court that the above case is remanded to the District Court for proceedings not inconsistent with this Court's decision in Emmett J. Stebbins v. Keystone insurance Co., et al., No. 24,658 (D.C. Cir. June 5, 1973).

Subsequent to reversal and remand with directions by the Appellate Court, the District Court entered the following rulings, in violation of Rule[1] 12(a)(1), Federal Rules of Civil Procedure:

The Motion to Dismiss of the Defendant Allstate Insurance Company having been considered by the Court, it is, without hearing pursuant to Local Rule 9(f), this 14th day of September, 1973,

ORDERED:

That the Motion to Dismiss of the Defendant Allstate Insurance Company be and is hereby granted; and

IT IS FURTHER ORDERED

That the Complaint be and is hereby dismissed.

---

1 "A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . ."

October 19, 1973:

> Upon consideration of the Motion of Plaintiff to Alter or Amend Order entered September 14, 1973, filed herein, September 21, 1973, it is this 19th day of October, 1973,
>
> ORDERED that the Motion be and the same hereby is denied.

November 27, 1973:

> This matter came before the Court upon the motion of Defendant Equal Employment Opportunity Commission to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in support of said motion as well as the arguments raised in Plaintiff's Opposition to said motion, it is hereby
>
> ORDERED that the motion of Defendant Equal Employment Opportunity Commission is granted and Plaintiff's complaint be and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

Plaintiff appealed to the Appellate Court to enforce its mandate,[2] issued August 14, 1973, pursuant to Rule 41,

---

2 "The question of damages and attorney's fees must also be considered, since the trial court rested its judgment

(Cont'd)

F.R.A.P. The Appellate Court promulgated its orders which are in derogation of the principles[3] of law enounced by the United States Supreme Court:

February 4, 1974:

> On consideration of appellant's motion for summary reversal, of the opposition thereto, of appellant's motion to consolidate with No. 73-2180, and appellant's pro se petition for mandamus to enforce mandate of this Court, it is
>
> ORDERED by the Court that appellant's aforesaid motions (1) for summary reversal, (2) to consolidate, and (3) for mandamus are denied, and it is

---

(Footnote 2 Cont'd)

> disallowing such compensation on the assumed fact of Stebbins' unemployability." Footnote 23, *Stebbins v. Keystone Insurance Company* (C.A.D.C., 1973), ___ U.S. App. D.C. ___, 481 F.2d 501.

[3] *In Re Sanford Fork & Tool Company* (1895), 160 U.S. 247, at 255. The Court asserted that if the district court mistakes or misconstrues the judgment of the appellate court, and does not give full effect to "the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate." *Annotation:* 98 L.Ed. 114, at page 129, Section 19.

Newman v. Piggie Park Enterprises, Inc. (1968), 390 U.S. 400. The court allowed attorney's fees to the prevailing party, in construing Section 204(b), 78 Stat. 244, which contains similar statutory language as Section 2000e-5(k), 42 U.S.C.

McDonnell Douglas Corporation v. Percy Green (1973), 411 U.S. 792, 36 L.Ed. 2d 668. Defining the guidelines for trial of Title VII, Civil Rights Cases.

FURTHER ORDERED by the Court, sua sponte, that the order of the District Court appealed from herein be, and the same hereby is, affirmed.

February 27, 1974:

On consideration of appellant's motion to reconsider *en banc* the order of this Court dated February 4, 1974, affirming the order of the District Court, it is

ORDERED by the Court that the aforesaid motion is denied.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered February 4, 1974; and an order denying Petitioner's Motion to Reconsider En Banc was entered February 27, 1974. See, *Opinions Below, supra.* Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

Subsequent to reversal and remand with directions, by the Appellate Court, whether or not the trial court's failure to require Allstate Insurance Companies and the Equal Employment Opportunity Commission, pursuant to Rule 12(a)(1), Federal Rules of Civil Procedure, to file and serve their *answer,* deprived petitioner of *procedural due process* of law?

or

Whether or not a motion to dismiss, or a motion for summary judgment, is considered a *responsive pleading*[4] within the meaning of Rule 12(a)(1) of the Federal Rules of Civil Procedure?

STATUTES INVOLVED

42 U.S.C. 1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 2000e-3(a): It shall be an unlawful employment practice for an employer to discriminate against any . . . applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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[4] See, 37-A *Words & Phrases 56*, and *Cumulative Annual Pocket Supplement*. See also, Rule 7(a), Federal Rules of Civil Procedure.

FIFTH AMENDMENT, U.S. Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

RULES INVOLVED

Rule 12(a)(1), F.R.C.P.:

> A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . .

Rule 27(c), F.R.C.P., Equitable Bill of Discovery:

> This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 34(c), F.R.C.P., Equitable Bill of Discovery:

> This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

STATEMENT OF THE CASE

Circa July 30, 1970, petitioner filed an application for writ of certiorari in this Court – *Stebbins*[5] *v. Allstate Insurance Companies*, Misc. 5361, to review the Judgment

[5] This case involved a violation of Section 2000e-2(a) of Title 42 United States Code, Section 703(a), 78 Stat. 255.

(no opinion) of the U.S. Court of Appeals for the District of Columbia entered May 19, 1970, affirming the order of the United States District Court for the District of Columbia, Civil Action numbered 2484-69. Certiorari denied November 9, 1970, 400 U.S. 909.

Subsequent to denial and prior to instituting the present proceedings,[6] petitioner sought employment opportunities with Allstate Insurance Companies, as a claims adjuster, in their offices situated in the District of Columbia, Commonwealth of Virginia, States of Maryland, West Virginia, and Delaware. Allstate retaliated, asserting in a letter[7] addressed to petitioner, dated June 28, 1971 –

> "Judging by previous correspondence and your past conduct, and in view of the litigation which you have initiated against other companies, we have concluded that . . . we can see no purpose in replying to your letters or in conducting any further correspondence with you."

A timely administrative complaint was filed with the Equal Employment Opportunity Commission, which is presently pending. Upon request or demand by petitioner, the Commission issued the statutory notice of right to sue. Petitioner filed a judicial complaint on behalf of himself and others similarly situated in the United States District Court for the District of Columbia, September 2, 1971, alleging, *inter alia*, that Allstate denied petitioner and members of his class the "same right . . . to make and enforce

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[6] Retaliation provision, Section 2000e-3(a), 42 U.S.C., Section 704(a), 78 Stat. 257; and the Civil Rights Act of 1866, 42 U.S.C. 1981.

[7] See Record, United States District Court, D. C., Complaint filed September 2, 1971, Allegation No. I(f).

contracts . . . as is enjoyed by white citizens," and that Allstate had retaliated against petitioner, individually "as the result of filing a charge under Title VII of the Civil Rights Act of 1964, Allstate Insurance Companies denied plaintiff employment opportunities." The Equal Employment Opportunity Commission[8] (hereinafter referred to as the Commission or EEOC) was joined as a non-party for the purpose of supplying testimony[9] and documentary[10] evidence and if needed to protect the class interest. After service of process upon all defendants-respondents and prior to expiration of time within which to file their answers (responsive pleadings), Allstate[11] and EEOC[12] filed motions

---

[8] 28 U.S.C. 1361, provides that –

> The district courts shall have original jurisdiction of any action in nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 76 Stat. 744.

[9] See, Rule 27(c), F.R.C.P., Rules Involved, *supra.*

[10] See, Rule 34(c), F.R.C.P., Rules Involved, *supra.*

[11] Allstate's Motion to Dismiss: September 23, 1971 –

> "1. The claim set forth in the Complaint is barred by the doctrine of collateral estoppel.
>
> 2. The Complaint is frivolous and totally without merit and was filed in bad faith.
>
> 3. The Complaint fails to state a claim upon which relief can be granted."

[12] EEOC's Motion to Dismiss:

> "1. To dismiss the action because the complaint fails to state a claim against defendant, EEOC, upon which relief can be granted.

(Cont'd)

to dismiss the verified complaint (demurrers, or pleas in confession and avoidance[13]). On September 27, 1971, petitioner-plaintiff filed and served upon Allstate a list of questions or interrogatories, which are presently pending, that is to say, not replied[14] to by EEOC or Allstate. Without hearing or oral argument, the trial court dismissed the verified complaint. See, *Opinions Below, supra.* Allstate and EEOC made no application to the District Court for extension of time within which to file their answers (responsive pleadings) to the verified complaint, pending review by the Appellate Court of the District Court's order of dismissal.

On appeal to the Appellate Court of the United States for the District of Columbia, by petitioner-plaintiff, the Appellate Court reversed and remanded with directions,[15] Order of July 24, 1973. See, *Opinions Below, supra.* The

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(Footnote 12 Cont'd)

> 2. To dismiss the action on the ground that the court lacks jurisdiction over the EEOC because Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.*, exempts any United States agency from coverage of the Title."

13 Rule 8(c), F.R.C.P.

14 See, Recommendation of Pretrial Examiner, November 19, 1971, which reads in pertinent part –

> "Recommended that defendant Allstate's motion to extend the time to answer said interrogatories until after disposition of the pending motion to dismiss be granted, and that Allstate have to and including twenty days after any denial of said motion within which to file answers or objections to said interrogatories."

15 See, Footnote 2, *supra.*

mandate, rescript or remittitur of the Appellate Court for the District of Columbia, August 21, 1973. Instead of filing and serving their answers to the verified complaint, within 10 days thereof, Allstate[16] and EEOC[17] filed and served the same motions to dismiss, predicated upon the same grounds rejected by the Appellate Court. Petitioner-plaintiff opposed the motions to dismiss, or "pleas in confession and avoidance" on the ground that "motions to dismiss and motions for summary judgment" are not "responsive pleadings" within the meaning of the Rules 12(a)(1), and 7(a) of the Federal Rules of Civil Procedure. See, 37-A, *Words & Phrases 56*, and *Cumulative Annual Report Supplement*. Petitioner appealed to the Appellate Court and the Appellate Court affirmed the second order of dismissal of the District Court. See, Orders entered February 4, and 27, 1974, *Opinions Below, supra.*

REASONS FOR GRANTING THE WRIT

(A)

Conflict with other decisions: The Fourth Circuit held in *Cox v. Babcock & Wilcox Company* (1972), 471 F.2d 13, at page 16, that the dismissal of an individual litigant's complaint[18] where class relief had been sought did not require dismissal of the class action, even though there was

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[16] See, Footnote 11, *supra.*

[17] See, Footnote 12, *supra.*

[18] See, Complaint, U.S.D.C., D. C. –

> "That plaintiff complains on behalf of himself and all others who may intervene and seek relief, and contribute to the expenses of this action, and for cause of action alleges: . . .

not a proper representative to maintain the suit. In the instant proceedings the Equal Employment Opportunity Commission is a proper[19] representative. This can be accomplished by re-arranging the party-litigants. This is to say, the EEOC can be made a party-plaintiff, pursuant to the equity powers of this Court. The Fourth Circuit remanded the class-action to the trial court for it to be maintained on the docket "for a reasonable time" to permit the presentation of any appropriate claims for relief under the class-action.

The Fifth Circuit held in *Pettway v. American Cast Iron Pipe Company* (1969), 411 F.2d 998, construing 42 U.S.C. Section 2000e-3(a), that an employer must respond in damages for retaliating against an employee who had pursued or asserted his statutory rights under Title VII of the Civil Rights Act of 1964, as amended March 24, 1972, Public Law 92-261, 86 Stat. 103.

The Seventh Circuit determined or decided in *Bowe v. Colgate-Palmolive Company* (1969), 416 F.2d 711, at 719 –

> A suit for violation of Title VII is necessarily a Class action as the evil sought to be ended is discrimination on the basis of a Class characteristic, *i.e.*, race, sex, religion or national origin. In our view, it is indistinguishable on this point from actions under Title II relating to discrimination in accommodations.

The issue raised by this conflict is of continuing importance and should be resolved by this Court.

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[19] See, Footnote 8, *supra.*

(B)

Deprivation of substantive and procedural due process of law: The failure of the courts below to require Allstate and EEOC to file "responsive pleadings" (Answers) within 10 days subsequent to entry of the Appellate Court's Mandate, August 21, 1973, prior to renewal or filing their same motion to dismiss (demurrer, or pleas in confession and avoidance) is repugnant to constitutional restraints of the Fifth Amendment, and the enabling provisions of the Rules of Civil Procedure, 28 U.S.C. 2072. The guaranty of due process found in the Fifth Amendment declares that no person shall "be deprived of life, liberty, or property without due process of law." The enabling Act reads in significant part that "such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial" by jury[20] as at common law and as declared by the Seventh Amendment to the Constitution. Petitioner does not complain of the Rules *per se*, but the construction and application of the Rules (Rule 12(b); failure to enforce Rule 12(a)(1)).

When a motion to dismiss is used or employed as the equivalent of a demurrer to test the legal sufficiency of pleadings, it is obvious to anyone who can read, write, or cipher (except code-pleaders) that the court is called upon merely to determine a question of law – no question of fact is presented. For the purpose of the motion, the court is confined to the pleadings. See, *Polk Company v. Glover*, (1938), 305 U.S. 5, at page 9:

> "Defendants' motion to dismiss like the demurrer for which it is a substitute (Equity Rule

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[20] *Curtis v. Loether, et al.* (February 20, 1974), Case # 72-1035, ___ U.S. ___, ___ S. Ct. ___, __ L.Ed. 2d ___.

> 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted."

In the proceedings at hand, the courts below were confined to the complaint and were not at liberty to consider the affidavits or other evidence upon the application for an order to dismiss the complaint. No question is ordinarily before the courts below as to the admissibility or consideration of evidence to support those pleadings. Where a vital and undetermined issue of fact – "retaliation, and denial of right to make and enforce contract" – are presented herein by the pleadings, a judgment should not be permitted to rest on an issue of law alone, without an evidentiary hearing.

In May 1973, this Court had an opportunity to define the guidelines for trial of Title VII cases. This Court has not defined the guidelines for Section 1981, 42 United States Code, cases. *McDonnell Douglas Corp. v. Percy Green* (1973), 411 U.S. 792, 36 L.Ed. 2d 668. The courts below disregarded the principles promulgated by this Court in the aforementioned case.

CONCLUSION

For the foregoing reasons, the writ should be granted to resolve the conflict in the circuits, and to enunciate the guidelines for trials of Section 1981 cases.

Respectfully submitted,

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No. 73-1476

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Allstate Insurance Companies, respectfully submits the following Brief In Opposition To The Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the complaint states a claim upon which relief can be granted?

STATEMENT OF THE CASE

In order to place the current controversy in proper perspective it is necessary to refer to prior litigation between the Petitioner and this Respondent. A similar action was previously filed by the Petitioner against this Respondent in the District Court for the District of Columbia (Civil Action No. 2484-68). The complaint there also charged unlawful employment practices. Respondent's motion for summary judgment in that case was granted on the ground that its refusal to employ the Petitioner was due to his failure to complete the required application and was not due to any discrimination proscribed by the Civil Rights Act of 1964. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit on May 19, 1970, and this Court denied certiorari on November 9, 1970, 400 U.S. 909. Certain exhibits in that case, of which this Court may take judicial notice, are attached hereto as Exhibits A and B. It is important to note Judge McGuire's finding in his order of March 6, 1969—"that since Plaintiff (Petitioner) failed and refused to complete an application for employment Defendants (Respondent) have not refused to employ him . . . ."

On May 31, 1970, Petitioner wrote to Respondent at its Rockville, Maryland, office, requesting advice on "job opportunities" in the Eastern Zone and particularly in Maryland, the District of Columbia and Virginia. He also requested that he be furnished with "listed" vacancies and "standard job description and specification." A copy of this letter is attached hereto as Exhibit C.

On June 22, 1970, Respondent informed Petitioner that if he were interested in making application for

employment he should apply to Respondent's office in Roanoke, Virginia. A copy of this reply is attached hereto as Exhibit D.

On July 6, 1970, Petitioner wrote to Respondent's Roanoke office requesting the same information as in his letter of May 31, 1970. A copy of this letter is attached hereto as Exhibit E.

Respondent attempted to reply to Petitioner's July 6, 1970 letter but, for reasons unknown to it, a mailed reply was returned undelivered.

On June 10, 1971, Petitioner wrote to Respondent's office in Roanoke, Virginia, requesting the same information as in his letters of June 22, 1970 and July 6, 1970. A copy of this letter is attached hereto as Exhibit F.

On June 28, 1971, Respondent wrote to Petitioner indicating that, in the Company's opinion, his letters were a form of harassment, that it was clear that Petitioner was not interested in obtaining a position with the Company and that no purpose would be served by replying to his letters or in conducting further correspondence with him. A copy of this letter is attached hereto as Exhibit G.

Petitioner filed his Complaint in this action on September 2, 1971.

On September 23, 1971, Respondent filed a Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted. The Motion alleged three bases for dismissal: (1) The complaint is barred by the doctrine of collateral estoppel; (2) the complaint is frivolous, totally without merit and was filed in bad

faith; and (3) the complaint fails to state a claim upon which relief can be granted. Numerous pleadings concerning discovery were filed but all discovery was held in abeyance pending action on the motion to dismiss. The motion to dismiss was granted on December 17, 1971, and Petitioner's motion to vacate the order of dismissal was denied on February 2, 1972.

On March 2, 1972, Respondent filed his Notice of Appeal to the United States Court of Appeals for the District of Columbia. Further proceedings on the appeal were held in abeyance pending decision in the case of *Stebbins* v. *Keystone Insurance Company, et al.*, No. 24,658. The Court decided that case on June 5, 1973 (reported at —— U.S. App. D.C. ——, 481 F.2d 501), and on July 24, 1973, ordered the current case to be, "remanded to the District Court for proceedings not inconsistent with this Court's decision in *Emmett J. Stebbins* v. *Keystone Insurance Co., et al.*" The *Keystone* case held that where a motion for summary judgment in a prior case had been based on two grounds: (1) failure to file an employment application, and (2) unemployability in any position of fiscal trust in the insurance industry, the doctrine of collateral estoppel could not be applied to prevent relitigation of the issue of employability in a subsequent proceeding.

It is important to note that, although the mandate of the Court of Appeals returning this case to the District Court is dated August 15, 1973, the case was actually returned to, received by, and entered on the Docket of the District Court on August 21, 1973.

On August 30, 1973, within the 10-day period permitted for further pleading, Respondent filed a Motion To Dismiss The Complaint For Failure To State A

Claim Upon Which Relief Can Be Granted. This motion alleged only two bases for dismissal: (1) the complaint is frivolous, totally without merit and was filed in bad faith, and (2) the complaint fails to state a claim upon which relief can be granted. Without specificity as to grounds, this motion was granted and the complaint dismissed by order of the District Court dated September 14, 1973. Petitioner's Motion To Alter Or Amend this order was denied on October 19, 1973 and on November 8, 1973, Petitioner appealed to the United States Court of Appeals for the District of Columbia. That Court on February 4, 1973, *sua sponte,* affirmed the order of the District Court and on February 27, 1974, denied Petitioner's Motion To Reconsider En Banc.

On April 3, 1974, Petitioner filed his petition for a writ of certiorari in this Court.

ARGUMENT

I. Proceedings Subsequent to the July 24, 1973, Decision of the United States Court of Appeals for the District of Columbia Circuit were Procedurally Proper.

Petitioner claims that the proceedings in the District Court subsequent to remand from the Court of Appeals denied him procedural due process and initially argues that the decision in this case should be reviewed because it is in conflict with other decisions such as: *Cox* v. *Babcock & Wilcox Company,* 471 F.2d 13 (4th Cir. 1972), *Pettway* v. *American Cast Iron Pipe Company,* 411 F.2d 998 (5th Cir. 1969), and *Bowe* v. *Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969).

In *Cox* the Fourth Circuit affirmed a finding by the lower court, after a full trial, that the individual plain-

tiff had not been discriminated against and reversed the lower court's dismissal of the class action feature of the case and remanded that part of the case to the District Court with instructions that if proper claims for further relief were not presented within a reasonable time, the class action should be dismissed. There is no conflict between that decision and the case *sub judice*. In the *Cox* case obviously there was a complaint which properly alleged a class action complaint for unlawful discrimination in employment. Such is not the case here because there is no valid complaint which could be returned to the lower court.

In *Pettway* the Fifth Circuit held that under the Civil Rights Act of 1964 an employee could not be discharged for filing a complaint with the Equal Employment Opportunity Commission, even though the complaint might contain false and malicious material directed toward the employer. There is no conflict between that decision and the case *sub judice*. Simply put, the *Pettway* case and the issues involved therein have absolutely no resemblance to any issue in the current case.

In *Bowe* the Seventh Circuit held that a classification restricting women to bidding on jobs not requiring lifting of more than 35 pounds violated the Civil Rights Act of 1964. The Petitioner quotes certain language from this case pointing out the essential class nature of violations of Title VII of the Civil Rights Act. However, he fails to indicate what that has to do with any issue in the case *sub judice*. Indeed, he cannot do so for it borders on the frivolous to even argue that the decision in *Bowe* is in conflict with the decision in this case.

Petitioner next argues that, following remand from the Court of Appeals, respondents were required to file answers to the complaint and that their failure to do so deprived him of procedural due process. This is but an obtuse way of alleging that the determinations that the complaint does not state a claim upon which relief can be granted, that is, the actual decisions of the courts below, were incorrect.

II. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

Petitioner in his Complaint attempts to allege violations of (1) the Civil Rights Act of 1866, 42 U.S.C. 1981, (2) Section 703 (a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and (b), and (3) Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a).

In the prior action Petitioner went to Respondent's office in Rockville, Maryland and indicated an interest in obtaining employment. He was given certain tests and received an application for employment. He returned the application but it was incomplete and lacking in the detail required for proper consideration. He was requested to complete the application but failed to do so. Petitioner subsequently brought suit against Respondent alleging a failure to hire because of racial discrimination. The District Court granted Respondent's Motion For Summary Judgment and, in so doing found that "... since Plaintiff (Petitioner) failed and refused to complete an application for employment Defendants (Respondent) have not refused to employ him." (Order dated March 6, 1969, Exhibit B).

As is evident from Exhibits C to G, since the last action, although Petitioner knew that he had to com-

plete an application for employment, he has not taken any steps to complete and submit the required application. His failure to do so and the absence of any allegation in the Complaint that he has done so precludes the Complaint from stating a claim upon which relief can be granted.

An essential requirement of each of the three allegations of the Complaint is that the Petitioner be a *bona fide* applicant for employment. This presupposes completion and submission of the application required of all such applicants. As a result of the prior litigation the Petitioner well knew that to be considered as an applicant for employment he had to complete and submit the application which had been furnished to him. He has not done so and this failure defeats his current claim.

This Court has recently addressed a similar issue concerning suits under Title VII of the Civil Rights Act of 1964. In *McDonnell Douglas Corp.* v. *Green*, — U.S. —, 36 L.Ed. 2d 668 (1973), the Court stated:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) *that he applied and was qualified for a job for which the employer was seeking applicants;* (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (emphasis added)

Since the Petitioner did not properly apply for employment with Respondent Allstate Insurance Companies, and has not alleged that he did so with respect

to each aspect of the Complaint, the Complaint fails to state a claim upon which relief can be granted.

Petitioner claims that the failure of Respondent to file a "responsive pleading" violates the Fifth Amendment to the Constitution and the enabling provisions for the Federal Rules of Civil Procedure, 28 U.S.C. 2072, and more particularly that the action taken by the District Court was contrary to Rule 12(a)(1) and Rule 12(b) of the Federal Rules of Civil Procedure. Insofar as here pertinent, Rule 12 provides:

Rule 12

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT OF THE PLEADINGS

(a) *When Presented.* A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him .... The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; ....

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted, ...

Petitioner apparently contends that it was error not to require Respondent to file an answer and that the failure to do so was a violation of the mandate of the Court of Appeals and the Federal Rules. The main

thrust of this contention must be that the action by the Court of Appeals on July 24, 1973 remanding the case to the District Court was a *denial* of Respondent's previously filed motion to dismiss. Of course, this was not the effect of the action of the Court of Appeals and the subsequent procedure followed by the District Court and affirmed by the Court of Appeals was proper and in accordance with the Federal Rules of Civil Procedure.

On July 24, 1973, the Court of Appeals remanded this cause to the District Court, "for proceedings not inconsistent with this Court's decisions in *Emmett J. Stebbins* v. *Keystone Insurance Co., et al., supra.* In that case the Court held that where a motion for summary judgment in a prior case had been based on two grounds: (1) failure to file an employment application, and (2) unemployability in any position of fiscal trust in the insurance industry, the doctrine of collateral estoppel could not be applied to prevent relitigation of the issue of employability in a subsequent proceeding. Since one of the grounds urged in the original motion to dismiss was the doctrine of collateral estoppel (see the Motion To Dismiss filed herein on September 23, 1971, and the Memorandum of Points and Authorities in support thereof), it is easy to see why this cause was remanded to the District Court for further proceedings. It is equally easy to see that the action of the Court of Appeals did not amount to a denial of the motion to dismiss such as to require Respondent to file an answer to the complaint. All the Court of Appeals did was to reverse the grant of the motion. Indeed, that is all they had power to do, for the authority to grant or deny motions to dismiss lies with the District Court and not the Court of Appeals.

Following remand, Respondent filed another motion to dismiss which contained two grounds: (1) that the complaint was frivolous, totally without merit and was filed in bad faith, and (2) that the complaint failed to state a claim upon which relief could be granted. This motion was filed within 10 days after the return of the case to the District Court, so it was timely filed. Rule 12(b)(6) of the Federal Rules was as applicable following remand as it was originally. Since that rule provides that failure of the complaint to state a claim upon which relief can be granted is a defense which may be raised by motion, the filing and granting of the motion were procedurally proper. As indicated above, the granting of the motion was also substantively correct.

CONCLUSION

The decisions below are procedurally and substantively correct and no special or important reasons have been shown why they should be reviewed. The decisions below are not in conflict with decisions of other circuits. No important question of federal law is involved therein, and all matters below followed the usual course of judicial proceedings.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STUART ROTHMAN
Counsel for Respondent
Allstate Insurance Companies
1666 K Street, N.W.
Washington, D. C. 20006

Of Counsel:

DAVID T. BRYANT
ROGERS & WELLS

Certificate of Service

I certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Emmett J. Stebbins, Petitioner, 5880 Eastern Avenue, N. E., Washington, D. C. 20011, by mail, postage prepaid and properly addressed, this 6th day of May 1974.

Stuart Rothman

Certificate of Service

I certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Emmett J. Stebbins, Petitioner, [illegible] Eastern Avenue, N. E., Washington, D. C. 20011, by mail, postage prepaid and properly addressed, this [illegible] day of May 1974.

EXHIBITS

Stuart Rothman

EXHIBIT A

CHARLES W. MILTON, JR., being duly sworn, deposes and says:

1. I was born on May 30, 1942 in Atlanta, Georgia, and am a citizen of the United States. In 1964 I was awarded the degree of Bachelor of Science in Business Administration, by the University of South Carolina, upon completion of the 4 years course of study. I was employed by Allstate Insurance Companies (hereinafter called "Allstate"), and now have two and one-half years of experience as a Personnel Assistant with Allstate. I am presently stationed in the Allstate Office at Atlanta, Georgia, in the capacity of Division Personnel Manager. I make this affidavit on the basis of my personal knowledge and experience.

2. In my regular capacity as Personnel Assistant, I interviewed Mr. Emmett J. Stebbins at our office in Hyattsville, Maryland, on May 14, 1968. I personally prepared the memorandum of this interview annexed to this affidavit (Annex A). In the course of the interview, I gave Mr. Stebbins the application form and all the oral and written explanations regarding claims adjustment positions which I give to all other applicants. I further advised him that we would need his completed application, and would be happy to consider him for the position applied for. Shortly thereafter he mailed to us the application dated May 15, 1968 (Annex B). On May 29th I acknowledged receipt of the application, and advised him that the application was not complete, and forwarded to him another application form for re-submission in complete detail if he was still interested in pursuing a career with Allstate (Annex C). On July 18th, my superior, Personnel Manager Orville A. Allen, wrote Mr. Stebbins the annexed letter (Annex D), calling his attention to my letter dated May 29th outlining what would be necessary if he was interested in pursuing employment with Allstate.

3. In the course of the interview on May 14th, Mr. Stebbins completed the two Thurstone tests, on personality and mental alertness, which are taken by all applicants. These tests are designed so that the test scores may be ascertained rapidly and mechanically. Allstate does not apply any minimum test score below which any applicant would be automatically disqualified for employment. Mr. Stebbins did not ask me about his test scores after taking these tests on May 14th. His test scores would not and did not remove him from consideration for employment as Property-Casualty Claims Adjuster. Test results are only one of the many factors in evaluating any and all applicants under the particular position description. Based on the completed application, the interview, and the test results, Allstate evaluates such factors as aptitude, work experience, education, reputation, willingness to work, neatness, cooperative attitude, and ability to contact the claimants and the public. Final authority to hire or reject applicants rests with my superiors.

4. As fully explained in the foregoing affidavit and documents annexed hereto: I did not reject Mr. Stebbins for employment on May 14th or at any time thereafter, because of race, color, or any other reason. Neither I nor my superiors failed or refused to employ him because of race, color, or any other reason. He will be considered fairly, objectively, and in full conformity with Federal and State law, as soon as he completes and returns to Allstate the regular application form, which is completed for such purposes by all applicants. Allstate's employment policies and methods, including the Thurstone tests taken by all applicants, are designed, administered, and acted upon, without discrimination against Mr. Stebbins or any other applicant because of race, color, religion, sex, or national origin.

/s/ Charles W. Milton, Jr.
Charles W. Milton, Jr.

ANNEX A

ALLSTATE

May 17, 1968

Re: *Interview with E. Stebbins*

Mr. Stebbins came in on May 14, 1968 for interview concerning the claims field. (He did not have a scheduled appointment). He refused to complete the employment application prior to a discussion with me.

His questions during the interview were: "Do you have a job description that I can see?" My reply was "no, job descriptions are in our Roanoke Office—but I would be available for questions concerning the job duties and requirements." He was taking notes during our discussion. I inquired as to why he wished to see a job description. His answer was "I like to read about the positions I am applying for". I offered the college recruiting information to him but he was not interested. (He has written Roanoke requesting a job description).

He also inquired as to the current job openings. I informed that positions were available. He asked if I had an employment list showing openings. I replied that I did but did not offer it to him.

Starting salary was the next area he inquired and what qualifications we looked for. My reply was a "base entrance pay grade of $550-880 per mo; basically a college degree for trainees with approximately $7,200 per annum.

I told Stebbins that I had given him enough information and would have to know more concerning his background. His qualifications were college degree, with law school exposure, and 6 years in the BI claims field. He was very short in his answers.

I informed him that we would need a completed application and offered to let him complete one. He said he preferred to take the application with him and mail back. He requested two applications. I inquired as to why he

wanted two. He preferred to make a carbon for his own records was his answer.

I gave him two applications with a self-addressed envelope with first class postage stamp. (He mailed application back two days later with registered stamp.)

He asked if mental tests were required and I informed him that we have two tests, a personality and a mental alertness test. He asked to take both test today of which he did. After completion of the tests he did not inquire as to the results, nor did I discuss.

I told Stebbins that he needed to complete the application and we would be happy to consider him. I gave him the college literature on claims and we terminated our discussion.

/s/ C. W. Milton
C. W. Milton
Personnel Assistant

FOR EMPLOYMENT

... should be completed in full. Questions relating to school subjects, hobbies, studies, and sports require specific answers. The job ... of this form should be as complete as possible, even including part-time jobs held during school years. All information you ... in strict confidence.

Mrs. Miss Emerald J. Stebbins Date May 15, 1968

6810 Eastern Avenue, Northeast, Washington, D. C. 20011 Telephone
(Street) (City) (State) (Zip Code)

Birth (Month) (Day) (Year) Sex Male Citizen of the United States Yes X No Social Security No. 267 188 053

lived in present city 17 If need arose, would you move? Yes What location do you prefer?

own an automobile? No Is it insured? Driver's License No. 243 7711

you ever been rejected or had a ... cancelled by any insurance co.? N/A If so, why?

you ever been bonded? Yes Have you ever been convicted of a felony or misdemeanor? No

...ever been rejected or had ...
...cancelled by any insurance co.? N/A If so, why?

...you ever been bonded? Yes Have you ever been convicted of a felony or misdemeanor? No If "yes" explain

...you licensed to practice law? No What state? Year licensed

FAMILY:

Home Owned Yess Rented Apartment Room

If home is mortgaged, how much $ No If you rent, how much paid per month $

If you have lived at present address less than five years, show previous addresses, length of time at each for last five years and whether you were an owner or renter.

Where do you bank? (List name and location) N/A

Marital status: Single X Married Remarried Date of marriage(s)

Separated Date of separation(s)

Divorced Yes Date of divorce(s) 1962

Widowed Date of spouse(s) death Cause of death

Engaged Expected date of marriage

Number of children One 4. Sex and date of birth of each Female (14 years of Age)

Number of other dependents None Relationship(s)

Given name of spouse N/A 7. Spouse's age

Is spouse employed, or regularly occupied with volunteer work?

Where? What capacity?

In the event of an emergency, whom would you wish notified (other than spouse):

Name

Address Telephone

Health of father Deceased Health of mother Deceased

(IF EITHER PARENT DECEASED, GIVE YEAR OF DEATH. IF ILL, NATURE OF ILLNESS)

Father's occupation (or former occupation) N/A

Check each Brother(s) or Sister(s)	Ages	Occupation(s)
Brother N/A Sister N/A		
Brother Sister		
Brother Sister		
Sister		

AL DATA:

... Good United Average Fair ... Brown

... 1/2 Height Five-Nine 3. Vision-I Wear Glasses

... Have any physical handicaps or physical limitations (describe) None

... Have: Hay Fever No ... Asthma No Allergies (list) No

... of last physical examination I have had no reason to submit to a physical within the one or two decades.

any serious illnesses, operations, accidents or nervous disorders you may have had, with approximate date of occurrence(s)

... None

TION:

... highest grade completed: High School 1 2 3 4; College 1 2 3 4 5(6)7

... School: Name and Location

... attended: from ... to ... day or evening classes

... ite high school subjects

... Liked high school subjects

... curricular activities (scholastic and athletic)

... offices held

...(s): Name(s) and dates attended. (Indicate day or evening classes.) (1) ... (3)

... Majors: (1) ... (2) ... (3) ...

... t least liked None

...(s) and year(s) received AB

...curricular activities (scholastic and athletic) You name it and I have participated

... offices held

... portion of your college expenses did you earn All How Military Benefits

... al or technical courses taken. Business Law, Contracts, Torts, Bills & Notes, Insurance, ...ations, Equity Pleadings, Constitutional Law, Money & Banking, Wills & Administrat... ...l & Civil Procedure, Property Personal & Real, Conflicts of Laws

... ...te typed 10 & 10 WPM

Memberships in civic, professional or social organizations. (Other than those whose name would indicate race, creed, etc. of its members) N/A

Hobbies or interests (past or present) Mathematics, Electronics, Radiology and Anatomy

In what additional activities would you like to engage

UNITED STATES SERVICE EXPERIENCE:

Service, if any: Branch Air Force Date entered 1942 Date discharged 1945

[ ] Yes
[ ] No Beginning rank or grade Aviation Cadet Highest rank or grade Captain

Type of discharge Honorable Terminal rank or grade Captain

Military duties or type assignment Personnel (Administrative)

Present military status: Ready Reserve N/A Standby Reserve Other

Explain in detail

BUSINESS EXPERIENCE: (Including part-time work)

I. Present Employment

1. Firm Telephone
Type of industry Legal Profession
Address
2. Title Investigation(negligence Cases) Department
3. Nature of work Legal & Non-legal Date Began
4. Name and title of immediate superior
5. Starting Salary N/A Present Salary
6. What do you most like about your job Secret
7. What do you least enjoy. The question is ambiguous
8. Why do you want to change jobs. Secret

Previous Employment. I shall answer all confidential question subsequent to employment

1. Firm Type of industry
Address
2. Title Department
3. Nature of work Employed From To
4. Name and title of immediate superior
Starting salary Salary at time of leaving
What did you like about the work

What did you dislike

Reasons for leaving

Department

Type of work — Employed From — To

Name and title of immediate superior

Starting salary — Salary at time of leaving

What did you like about the work

What did you dislike

Reasons for leaving

Positions Held:

Name of Company	Type of Work	Date Began	Date Left	Reason for Leaving

Have you ever worked for Allstate or Sears? — If so, when? — Where?

The reason for this application [ ] Newspaper Ad [ ] Agency [ ] Referred by Employe [ ] Referred by school

Mr. Russell Wileman, Personnel Director of Regional Office of Na tion-Wide Comm.
Suggested that I Contact Allstate (Annapolis, Maryland office of Nation-Wide.

What additional education or experience have you had that you think is useful in your present job, or would be of value if you were to be promoted to a more responsible position?

College and Legal Education and Legal Experience

Notation - I can assure you that I can efficiently perform any Duties Assigned.

Regardless of your present salary, what income would you need to enable you to live as you would like to live? (This relates to type of housing and general living conditions you may desire ultimately; and your response will not be construed as dissatisfaction with your present salary.)

I do not think that is a fair question.

What starting salary do you desire? $8,200.00 annually

What kind of work are you applying for? Prpoperty and Casualty Adjustor.

What are your plans for the future?

I understand that any offer of employment which may be made to me is contingent on satisfactory reference information and successfully passing the company's physical examination.

If employed, I agree to submit myself to examination by a physician or physicians of the company's selection as often as may be requested.

Signature Emmett D. Holmes

APPLICANT — Do not write in this space

INTERVIEWER'S COMMENTS

PHYSICAL EXAMINATION

Date — Time

Physician

EMPLOYMENT

Starting date:

Source:

Location:

Dept.:

Position:

Salary:

20

ANNEX C

May 29, 1968

Mr. E. J. Stebbins:
5880 Eastern Avenue N. E.
Washington, D. C. 20011

Dear Mr. Stebbins:

Thank you for returning the Confidential Application you completed on May 15, 1968 indicating an interest in the position of Property and Casualty Adjuster.

The application you returned was not completed in detail and before we can proceed with future selection interviews, we need a full and completed Confidential Application. This, of course, is needed for an objective and fair evaluation.

A Confidential Application is enclosed for your re-submission if you are still interested in pursuing a career with our Company.

Very truly yours,

C. W. MILTON, JR.
C. W. Milton, Jr.
Personnel Assistant

ANNEX D

July 18, 1968

Mr. Emmett J. Stebbins
5880 Eastern Avenue, Northeast
Washington, D. C. 20011

Dear Mr. Stebbins:

This is in reply to your letter of June 16, 1968 requesting our job description for claim adjusters.

Enclosed is a brochure outlining our claim positions and the opportunities in our claim organization. We do not pass along our official job descriptions to applicants. I believe Mr. C. W. Milton's letter of May 29, 1968 out-

lined what would be necessary if you are interested in pursuing employment with our Company.

ORVILLE A. ALLEN
Orville A. Allen
Personnel Manager

OAA:ml
Enclosure

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMMETT J. STEBBINS, *Plaintiff*

v.

ALLSTATE INSURANCE COMPANIES ET AL, *Defendants*

Civil Action #2484-68

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT

(Filed March 7, 1969)

This matter coming on to be heard upon Defendants' Motion for Summary Judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure and this Court's Rules, including Rule 9(h), and it appearing from the pleadings and other documents before the Court and argument by Defendants' Counsel that there is no genuine issue as to material fact; and it further appearing that since Plaintiff failed and refused to complete an application for employment Defendants have not refused to employ him;

ORDERED: Motion for Summary Judgment is granted and the Complaint herein is dismissed.

/s/ MATTHEW F. MCGUIRE,
Matthew F. McGuire
Senior Judge

Date: 3/6/69

EXHIBIT C

3143 Lyndale Place, Southeast,
Washington, District of Columbia,
Zip Code 20019,

May 31, 1970.

Allstate Insurance Companies,
Personnel Officer,
Claims Department,
1590 Rockville Pike,
Rockville, Maryland.

Gentlemen:

Please advise me of the "job opportunities" available within the Eastern Zone, in general, and particularly in the State of Maryland, District of Columbia, and the Commonwealth of Virginia. I am desirous of obtaining employment in your Claims Department. What "job opportunities" are offered by Allstate to or for "high school graduates" and "college graduates"?

If you have or possess any vacancies within the Claims Departments within the State of Maryland, District of Columbia, and the Commonwealth of Virginia, please supply me with copies of the "listed" vacancies and the "standard job description and specification" for each "listed" vacancy; or advise me as to place or location this requested information can be ascertained or had for inspection, copying or examination.

Your cooperation is appreciated.

Sincerely,

/s/ EMMETT J. STEBBINS
Emmett J. Stebbins

EXHIBIT D

June 22, 1970

Mr. Emmett J. Stebbins
3143 Lyndale Place, S. E.
Washington, D. C. 20019

Re: *Emmett J. Stebbins Versus Allstate Insurance Company*

Dear Mr. Stebbins:

Since you reside in the District of Columbia which is a part of our Roanoke Regional territory located at 1819 Electric Road, Roanoke, Virginia, please contact the Personnel Department in the aforementioned office if you are interested in making application for employment.

Sincerely,

MICHAEL A. SNIPES

EXHIBIT E

3143 Lyndale Place, Southeast,
Washington, District of
Columbia, Zip Code 20019,

July 6, 1970.

Personnel Officer, Claims Department,
Allstate Insurance Companies,
1819 Electric Road,
Roanoke, Virginia.

Dear Sir:

Please advise the undersigned of the "job opportunities" available within the Companies' Offices during business within the Commonwealth of Virginia, District of Columbia, Delaware, Maryland, and West Virginia. I am desirous of obtaining employment in any position or occupation within which I meet the qualifications of the Companies' "Standard Job Description And Specifications".

What "job opportunities" are offered or available for "high school graduates" and "college graduates" within the offices aforementioned?

If you have or possess or is contemplating any vacancies within any Departments within the Offices aforementioned, please supply me with copies or a copy of the "listed vacancies", or contemplated vacancies and the "Standard Job Description And Specifications" for each listed or contemplated vacancies; or, advise the undersigned as to place or location this requested information can be ascertained; or, had for inspection, copying, examination; or, for possession, prior to submission of an application for employment.

Thank you, sir, for your cooperation.

Sincerely,

/s/ EMMETT J. STEBBINS
Emmett J. Stebbins

EXHIBIT F

3143 Lyndale Place, Southeast,
Washington, District of Columbia,
Zip Code 20019,

June 10, 1971.

Personnel Officer,
Allstate Insurance Companies,
1819 Electric Road,
Roanoke, Virginia.

Gentlemen:

Please advise the undersigned of the "job opportunities" available within the Companies' offices during business within the Commonwealth of Virginia, District of Columbia, Delaware, Maryland, and West Virginia. I am de-

sirous of obtaining employment in any position or occupation within which I meet the qualifications of the Companies' "Standard Job Description And Specifications".

What "job opportunities" are offered or available for "high school" graduates and "college graduates" within the offices aforementioned?

If you have or possess or is contemplating any vacancies within any department within the offices aforementioned, please advise or supply me with copies or a copy of the "listed vacancies", or contemplated vacancies and the "Standard Job Description And Specifications" or "Position Description" for each listed or contemplated vacancy; or, inform the undersigned as to place or location this requested information can be ascertained; or, had for inspection, copying, examination; or, for possession, prior to submission of an application for employment.

Thank you, sir; for your cooperation.

Sincerely,

/s/ EMMETT J. STEBBINS
Emmett J. Stebbins

EXHIBIT G

June 28, 1971

Mr. Emmett J. Stebbins
3148 Lyndale Place, S.E.
Washington, D. C. 20019

Dear Mr. Stebbins:

We have your June 10 letter relative to employment opportunities in the District of Columbia, Delaware, Maryland, Virginia and West Virginia.

Regarding your request for copies of standard job descriptions of claim adjuster positions, we wish to remind

you that you already are in possession of such descriptions. The descriptions of Property Loss Adjuster A and B and Casualty Loss Adjuster A and B were furnished to you December 10, 1968, as Exhibits 1, 2, 3 and 4 annexed to Defendant's Response to Plaintiff's Interrogatories. There has been no subsequent change in these job descriptions.

Judging by previous correspondence and your past conduct, and in view of the litigation which you have initiated against other companies, we have concluded that your requests for information regarding employment constitute a form of harassment. It seems amply clear that you are not interested in obtaining a position with this company. Accordingly, we can see no purpose in replying to your letters or in conducting any further correspondence with you.

Sincerely,

MICHAEL A. SNIPES
Division Personnel Mgr.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1476

EMMETT J. STEBBINS, PETITIONER

v.

ALLSTATE INSURANCE COMPANIES
AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner contends that the district court improperly dismissed his complaint, allegedly without requiring respondents to answer.

In July 1971, petitioner filed an administrative complaint with the Equal Employment Opportunity Commission, charging Allstate Insurance Company with employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* In September 1971, the Commission issued a right-to-sue letter to petitioner; he then filed suit against Allstate, alleging that the company had deprived him and members of his class of their statutory rights as

defined in Title VII and the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 1981 (R. 1). Petitioner also joined the Commission as a defendant alleging, in part, that the Commission had withheld "documentary evidence of racial employment discrimination by Allstate" (R. 1, paragraphs I(g), (h)). In a separate claim, petitioner sought certain depositions, responses to interrogatories, and documents from the Commission, under Rules 27(c) and 34(c) of the Federal Rules of Civil Procedure (R. 1, paragraph II(e)).

Respondent Allstate moved to dismiss the complaint for failure to state a claim upon which relief could be granted, asserting, *inter alia,* that the claim set forth in the complaint was barred by the doctrine of collateral estoppel (R. 3). The Commission filed a motion to dismiss for failure to state a claim against it and for lack of jurisdiction (R. 10).

The district court dismissed the complaints against both the Commission and Allstate (R. 20, 28), and petitioner appealed (R. 25). While the appeal was pending, the court of appeals decided *Stebbins* v. *Keystone Insurance Co.,* 481 F. 2d 501 (C.A.D.C.), which held improper, in a similar case filed by petitioner, a dismissal grounded on the doctrine of collaterl estoppel. On July 24, 1973, the court of appeals remanded the instant action for proceedings not inconsistent with its decision in *Stebbins* v. *Keystone Insurance Co., supra* (R. 29). Petitioner did not seek review of that decision in this Court.

Respondent Allstate renewed its motion to dismiss for failure to state a claim upon which relief could be granted on the grounds advanced earlier, with the

exception of collateral estoppel (R. 30). This motion was granted on September 14, 1973 (R. 33). On October 29, 1973, the Commission renewed its motionto dismiss (R. 39) which was granted (R. 42). Petitioner appealed from these dismissals (R. 40) and the court of appeals summarily affirmed on February 4, 1974. A petition for rehearing *en banc* was denied on February 27, 1974. The petition for a writ of certiorari was filed on April 3, 1974.

The district court's dismissal of the cause against the Commission was proper, since petitioner failed to state a claim against the Commission under either Title VII or 42 U.S.C. 1981.[1] Petitioner neither sought employment with the Commission nor claimed that the Commission interfered with his attempt to secure employment or in any way harmed any of his employment-connected rights or privileges. Petitioner's reliance on Rules 27(c) and 34(c) of the Federal Rules of Civil Procedure to sustain a claim that the Commision should respond to interrogatories, make its officials available for depositions, and provide documents was properly found not to afford a basis for an independent action against the Commission. Instead, the Rules provide for the discovery of such materials without making the person providing the information a party. See Rules 26, 30, 31, Fed. R. Civ. P.[2]

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[1]Rule 12(b)(6), Fed. R. Civ. P., provides that the failure to state a claim upon which relief can be granted may be raised, as it was here, by a motion to dismiss. That motion constituted the answer for purposes of Rule 12(a), Fed. R. Civ. P.

[2]Rule 30(b)(6), Fed. R. Civ. P., provides specifically for naming government agencies in notices of intent to take depositions and in subpoenas.

It is not clear that the court of appeals' remand affected the district court's original dismissal of the case against the Commission. The remand order directed the district court to reconsider the case in light of *Stebbins* v. *Keystone Insurance Co.*, *supra*, which dealt only with the doctrine of collateral estoppel; the Commission had not relied on this doctrine to support its first motion to dismiss. Nevertheless, the Commission did renew its motion to dismiss in the district court after remand (R. 39). The district court granted this motion, and the court of appeals summarily affirmed. Thus, the court of appeals concluded that its earlier mandate had been given proper effect.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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